No. 12891

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

KWAN SHUN YUE,

Appellee.

APPELLANT'S OPENING BRIEF.

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I.

Jurisdictional Statement.

(a) The United States District Court for the Southern District of California had jurisdiction by virtue of 8 U. S. C. 701 (Jurisdiction to Naturalize), and the matter came before the Court on the motion of the United States of America for an order denying the petition of Kwan Shun Yue, a national of China, for naturalization.

(b) This Court has jurisdiction by virtue of 28 U. S. C. 1291 (Final Decisions of District Courts).

II.

Statement of Facts.

The petitioner, Kwan Shun Yue, applied for admission to the United States at Seattle, Washington, July 20, 1924, in possession of a certificate, as a treaty merchant, issued under Section 6 of the Chinese Exclusion Act (22 Stat. 58, Act of May 6, 1882, as amended). The certifi-

cate had been visaed by the American Consul at Hong Kong, June 27, 1924, and petitioner sailed from China about July 2, 1924. On September 9, 1924, the Board of Review of the Department of Labor ordered the subject excluded on the ground that he was not coming to the United States as a bona fide merchant under and in pursuance of any treaty of commerce and navigation.

Habeas Corpus proceedings were instituted in behalf of petitioner and others in the District Court for the Western District of Washington, and the writ was granted. The judgment of the District Court was affirmed by the United States Court of Appeals for the Ninth Circuit on November 13, 1925, in the case of *Weedin v. Wong Tat Hing, et al.,* 6 F. 2d 201.

A certificate of arrival, showing petitioner's admission as a treaty merchant under Section 3(6) of the Immigration Act of 1924 was filed with the petition in this proceeding for naturalization [R. 24, 3, 10, 28.]

The United States moved for an order denying the petition for naturalization [R. 3] on the grounds that (a) petitioner has failed to establish lawful admission to the United States for permanent residence and (b) a valid certificate of arrival was not filed with the petition. [R. 23.]

Said motion came on for hearing before the Honorable James M. Carter, Judge of the said District Court, on or about the 29th day of December, 1950. The Court thereupon denied the motion of the United States and ordered petitioner admitted to citizenship. [R. 4, 33.]

III.

Questions Presented by Appeal.

(a) Whether the petitioner's admission to the United States after July 1, 1924, as a treaty merchant, was admission to the United States for permanent residence for naturalization purposes.

(b) Whether a certificate of arrival as a treaty merchant satisfies the requirement that a certificate of arrival showing lawful entry as an immigrant for permanent residence must be filed with petitioner's petition for naturalization.

IV.

ARGUMENT.

A. Petitioner's Admission to the United States After July 1, 1924, as a Treaty Merchant Was Not for Permanent Residence for Naturalization Purposes.

The issue in the instant case should not be confused with recent decisions holding that Chinese persons who have been admitted to the United States *subsequent* to July 1, 1924, as minor children of Chinese merchants who had been admitted to the United States *prior* to July 1, 1924, could be considered as having a lawful admission for permanent residence for naturalization purposes (*Wong Choon Hoi,* 71 Fed. Supp. 160, appeal dismissed 164 F. 2d 699, 9 Cir. 1947; *Petition of Chi Yan Cham Louie,* 70 Fed. Supp. 493, app. dism. 166 F. 2d 15, 9 Cir. 1947; *Pet'n of David Jow Gin,* U. S. D. Ct., Chicago, No. 323406, app. dism., 7 Cir. 6/9/49, 175 F. 2d 299; and *Petition of Yung Poy,* 177 F. 2d 144.) In those cases the fathers had been admitted *prior* to July 1, 1924, and were considered as having a lawful admission for perma-

nent residence, while the minor children were considered to have gained their permanent residence through the theory of domicile of the parent.

In the instant case, he was admitted on his *own* status as a merchant and not on the basis of any rights derived from a person who had previously been admitted for permanent residence.

This petitioner's right to enter the United States was predicated essentially upon Article II of the Treaty of Commerce and Navigation with China, dated November 17, 1880[1] (22 Stat. 8261), and a subsequent treaty of March, 1894[2] (28 Stat. 1210).

Since, however, the instant petitioner entered the United States after July 1, 1924, his status must also be evaluated in the light of the Immigration Act of 1924, 43 Stat. 153, which became effective on July 1, 1924. It is not disputed that Chinese merchants and their families who entered the United States prior to July 1, 1924, may be regarded as

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[1]The pertinent section of Article II of the Treaty reads as follows: "Chinese subjects, whether proceeding to the United States as teachers, students, merchants or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States, shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities and exemptions which are accorded to the citizens and subjects of the most favored nation."

[2]The pertinent section of the Treaty is Article III, which reads as follows: "The provisions of this convention shall not affect the right at present enjoyed of Chinese subjects, being officials, teachers, students, merchants or travellers for curiosity or pleasure, but not laborers, of coming to the United States and residing therein. To entitle such Chinese subjects as are above described to admission into the United States, they may produce a certificate from their government or the government where they last resided visaed by the diplomatic or consular representative of the United States in the country or port whence they depart * * *"

admitted for permanent residence, as neither the Treaty nor the Act of May 6, 1882, as amended by the Act of July 5, 1884, then in effect, contained any limitation restricting the term or nature of their stay in the United States. However, in enacting the Immigration Act of 1924, Congress made drastic revisions in the earlier patterns of regulation. All aliens seeking to enter the United States were designated as immigrants, except the groups classified as non-immigrants in Section 3, 8 U. S. C. 203. Immigrants were required to obtain immigration visas, and, except for those classified as non-quota immigrants, were subject to quota restrictions. (Secs. 4, 11, 13(a), Immigration Act of 1924, 8 U. S. C. 204, 211, 213(a).) Section 3(6) of the 1924 Act, 8 U. S. C. 203(6), classified as a non-immigrant "an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation."

Judge Carter stated, with respect to the Treaties of November 17, 1880 and March 17, 1894, between this country and China, and the Immigration Act of 1924, that "It is elemental that Congress, by statute, cannot vary or diminish rights created by a Treaty, * * *" [R. 30.] We challenge this statement by the Court and would cite to the contrary so recent an authority as the decision of the Supreme Court in the case of *Moser v. United States,* 71 S. Ct. 553, wherein a treaty with Switzerland and the Selective Training and Service Act were considered. In that case, the Supreme Court said "Not doubting that a treaty may be modified by a subsequent Act of Congress, it is not necessary to invoke such authority here, * * *" In support of the statement that a treaty may be modified by a subsequent Act of

Congress, the Supreme Court cited the following cases: *Clark v. Allen,* 331 U. S. 503; *Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd.,* 291 U. S. 138; *Head Money Cases* (*Edye v. Robertson*), 112 U. S. 580.

However, in enacting Section 3(6) of the 1924 Act, Congress did not seek to nullify existing treaties. On the contrary, the legislative history indicates that Section 3(6) was designated to safeguard treaty obligations. (House Rep. 360, 68th Cong., 1st Sess.) But in limiting the terms of admission, Congress actually was effectuating the purpose of the treaties, which sought merely to enable nationals of the contracting nations to enter for the purposes of trade, and not for permanent settlement. This aim seems clearly shown in the 1880 treaty with China, which lists merchants with traders, students and travelers for curiosity—clearly not permanent settlers—and authorized the excepted categories "to go and come of their own free will and accord." This hardly appears to have envisioned a formula for permanent settlement. As pointed out by the House Committee on Immigration and Naturalization in House Report 360, 68th Congress, 1st Session, page 2, with respect to the bill which became the Immigration Act of 1924, the admission of non-immigrants for a limited time only and so long only as they maintain the status under which admitted "fully satisfies treaty requirements." Congress in the 1924 Act, therefore, deliberately excluded the treaty merchants from its designation as immigrants—those coming for permanent residence—and listed them with the non-immigrants—whose sojourn was limited in period or purpose. It can hardly be disputed, therefore, that treaty merchants, including those who entered under the treaty with China, admitted

to the United States after June 30, 1924, are not classed as permanent residents for naturalization purposes, nor do the treaties with China, pertinent sections of which are set out as footnotes, *supra,* contain any obligation to admit merchants for permanent residence.

In consequence, Section 3(6) merchants have, by regulations of the Immigration and Naturalization Service ever since the effective date of the Immigration Act of 1924 been admitted only temporarily, to continue during maintenance of status as a merchant. Such regulation has been known to Congress and received its implied approval. One indication of this is the Committee Reports (Senate Report No. 805, 72nd Congress, 1st Session; and House Report No. 431, 72nd Congress, 1st Session) upon the Act of July 6, 1932 (47 Stat. 607), amending Section 3(6) of the Immigration Act of 1924 wherein the Committees of the Senate and the House in separate reports but in identical language stated as follows:

> "Under the present law one of the classes of aliens stated in section 3 of the immigration act of 1924 to be excepted from aliens who are defined in the section to be 'immigrants' is '(6) an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation.' Under the regulations issued by authority of section 24 of the act to carry out the provisions of the act, the provisions of section 3(6) have been interpreted to accord nonimmigrant status to an alien coming to the United States solely to carry on trade of an international character between the United States and the foreign state from which he comes under and in pursuance of the provisions of a treaty of commerce and navigation in existence at the time of the

> passage of the immigration act of 1924. The provisions of the section referred to have also been interpreted to be applicable to the wives and minor children of treaty aliens in line with the holding of the Supreme Court of the United States in Cheung Sum Shee v. Nagle (268 U. S. 336)."

The regulation of the Immigration and Naturalization Service in effect at that time, which is mentioned in the foregoing, provided as follows (Rule 3, subd. H, par. 3):

> "Where the examining officer is satisfied beyond a doubt that an alien seeking to enter the United States as a non-immigrant pursuant to subdivision (6) of section 3 of the immigration act of 1924 is entitled to enter solely to carry on trade under and in pursuance of a treaty of commerce and navigation which existed on May 26, 1924, he may admit such alien, or his lawful wife and minor children, if otherwise admissible, on condition that such alien shall maintain such status of a non-immigrant during his stay in the United States, and upon failure or refusal to maintain such status that he will voluntarily depart."

This case, therefore, falls squarely within the reasoning of *In re Pezzi,* 29 F. 2d 999, D. C., Calif. (1928). That case was a petition for naturalization by a woman who had entered the United States in 1925 as a non-immigrant alien. In 1926 she was granted permission by the Department of Labor to remain in the United States indefinitely, so long as her husband maintained his status as a treaty merchant. The record showed that the petitioner was admitted to the United States under Section 3(2) of the Immigration Act of 1924 and that her status was later changed to that of the wife of a treaty merchant under Section 3(6) of that act. The petitioner had re-

sided in the United States for the statutory period and urged that she intended to remain permanently in the United States; that, consequently, she was lawfully admitted to the United States for permanent residence and was therefore eligible for naturalization. The Court denied the petition, and held, at page 1001:

> "In order to be entitled to naturalization, an alien must establish lawful entry into the United States as an immigrant, with intent to remain in the United States permanently. An alien who enters the United States *without inspection and admission as an immigrant for permanent residence* is not entitled to naturalization under our statutes. *Kaplan v. Tod,* 267 U. S. 228, 45 S. Ct. 257, 69 L. Ed. 585; *In re Kempson, et al.,* 14 F. 2d 668; *In re Jensen,* 11 F. 2d 414; *Ex Parte Marchant, et al.,* 3 F. 2d 695."

The Court further said, at page 1002:

> "Has the petitioner here met the requirements of the law? I think not. The petitioner has no status in the United States, other than being the wife of her husband. Her husband's status is defined by the provisions of Section 3 of the Quota Act of 1924 and the treaty of commerce and navigation between the United States and Italy of 1871 (17 Stat. 845). This treaty defines the status of 'Italian citizens in the United States and citizens of the United States in Italy.' Article 1. It clearly contemplates the temporary stay of the merchants of one country in the territory of the other. It accentuates the fact that the citizen of the one country is entitled to certain rights and privileges in the other country, including the privilege of being accompanied by wife, minor children, servants, etc., solely and wholly because such citizen of one country is in the other

country, temporarily, and for no other purpose than to carry on trade. There is not the slightest thought involved in the language of the treaty that the citizen of one country, residing in the other country as a treaty merchant, is laying the foundation for becoming a citizen of the other. Everything in the treaty negatives that thought.

Neither the petitioner nor her husband could have been admitted, under the credentials they carried, as immigrants or as persons coming for the purpose of permanently residing in the United States. They were admitted specifically as nonimmigrant aliens, and specifically under the language of the Quota Law of 1924, as 'aliens entitled to enter * * * solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation.' 8 U. S. C. 203. The word 'solely' there means exactly what it says."

The Court referred to the argument of counsel as to the petitioner's rights under the treaty with Italy, and said:

"The treaty rights are clear and unambiguous, and are limited solely to the right of all the freedom of movement and protection under our laws that are essential to the carrying on of trade as a citizen of a friendly nation, really moving in this country under the flag of his own country and being here for temporary purposes. The Immigration Quota Act of 1924 sharpens this doctrine of the rights of a treaty merchant and is wholly in harmony with it. Should it be true that the Immigration Act contains additional limitations, that makes the status of the treaty merchants all the more pronounced."

The Court consequently ruled that the petitioner had not complied with the requirements of the naturalization laws as to an entry into the United States for permanent residence, and that therefore her petition must be denied. It should be noted that the treaty that was under consideration in the *Pezzi* case, the treaty with Italy of February 26, 1871, specifically provided that the citizens of the respective countries parties to the treaty would have the "liberty to sojourn and reside in all parts whatever of said territories," referring to the territories of the countries. They were also given the right to enjoy the privileges and rights of natives of the countries and to carry on trade and commerce with restriction (17 Stat. 845.) Likewise, under Article II of the treaty, citizens of each of the countries had the right to travel in the states and territories of the other country.

The similarity between the foregoing case and the present issue cannot lightly be disregarded. In both cases the petitioners were admitted to the United States subsequent to the passage of the Immigration Act of 1924; in both cases the status of the petitioners was that of a nonimmigrant under Section 3(6) of that Act, with the right to remain indefinitely in the United States; in both cases the immigration status of the petitioners was based upon a treaty with a foreign country relating to trade and commerce. No good reason, in fact or law, can be discerned why the rule in the case of *In re Pezzi* should not apply to the present issue, particularly since the cited case is not unique but represents a theory of law which has been uniformly followed.

In the case of *Subhi Mustafa Sadi v. United States,* 48 F. 2d 1040 (2 Cir. 1931), a petition for naturalization was

filed by a person who had entered the United States on August 1, 1923, as a non-quota immigrant, student, under the Immigration Act of 1921. Deportation proceedings were instituted against him and upon application for habeas corpus such proceedings were dismissed on the ground that he was exempt from the quota and not subject to deportation. In connection with his petition for naturalization, the subject argued that the order sustaining the writ of habeas corpus fixed his status as an alien admitted to the United States for permanent residence. The Court denied the petition for naturalization, and stated:

> "This appears to be a case of unusual hardship, but the status above quoted explicitly forecloses any right to the appellant to be admitted to citizenship on his pending petition. We do not now undertake to determine whether or not he was entitled to entry for permanent residence at the time he was admitted at Boston. The fact remains that he was not so admitted, and while that record stands he cannot comply with the statute requiring his lawful entry for permanent residence to be established. See *In re* Weig, 30 F. 2d 418.
>
> It is urged that the order sustaining the writ of habeas corpus fixed his status as that of an alien admitted for permanent residence. To the extent that it had the effect of preventing his deportation upon the warrant which had been issued, it did, of course, lend some color of permanence to his stay, in that he successfully withstood that attempt to deport him, but it did not change in any respect the terms and conditions of his original entry. It simply gave effect to the right he then possessed to remain in this country notwithstanding the order

of deportation which had been issued. In respect to his ability to lay an essential foundation for his admission to citizenship, he stands in exactly the same situation he would have been had no warrant for his deportation been issued and no writ of habeas corpus sustained in his behalf."

Upon rehearing the Court again said, at page 1041:

"To be sure, his discharge on the writ of habeas corpus did, as we said before, establish his right to remain in this country in spite of the effort then being made to deport him, but, because it did not necessarily require proof that he had been admitted for permanent residence, it now is of no aid to him when he must show that fact as a condition precedent to the validity of his petition for naturalization. See U. S. *ex rel.* Gentile v. Day, 25 F. 2d 717."

Here again we see a decision by an appellate court to the effect that the mere fact that a petitioner for naturalization is not deportable, does not create a lawful admission for permanent residence for naturalization purposes. A similar decision was made in *Warblow v. U. S.,* 134 F. 2d 791, (2 Cir. 1943), where the Court in ruling upon the question of lawful continuous residence required of a petitioner for naturalization, said, at page 792:

"If what is a legal admission for permanent residence for the purposes of naturalization is to be determined in accordance with the immigration laws, it is clear that the appellant had not resided in this country for at least two years immediately preceding the date of his petition in pursuance of a legal admission for permanent residence."

The Court further said:

> "When aliens enter the United States they are lawfully here for permanent residence only if they have complied with the requirements of the laws of this country applicable to the incoming of such people. Those laws are the immigration laws and so far as we know, or the appellant has been able to point out, are the only laws under which the right, or the contrary, of an alien to come here and stay may be determined. When the nature of his residence in the United States has been so determined, his status under the naturalization laws is established so far as that feature is concerned. They set up no different general standards of their own in that regard."

It can be seen, therefore, that insofar as the decisions of the courts are concerned, it is the established rule that a petitioner for naturalization must establish a lawful admission to the United States for permanent residence as an immigrant. The mere fact that the alien is not deportable does not create a status of lawful permanent residence in the United States, nor does a lawful admission as a non-immigrant constitute a basis for a petition for naturalization.

On December 17, 1943, Congress passed the Chinese Exclusion Repeal Act (57 Stat. 600). Section 3 of the Statute directed that Chinese persons or persons of Chinese descent be added to the racial groups that are eligible for naturalization. In enacting this legislation, Congress did not contemplate that all Chinese persons in the United

States should thereby be naturalized. On the contrary, Congress merely put the Chinese on a parity with other racial groups and insisted that they qualify for naturalization on the same terms as all other applicants. This design was specifically asserted by the Congressional Committees which considered the legislation, in the following language (House Rep. 732; Sen. Rep. 535, 78th Congr., 1st Sess.):

> "The number of Chinese who will actually be made eligible for naturalization under this section is negligible. There are approximately 45,000 alien Chinese persons in the United States (continental, territorial, and insular). However, a large number of these Chinese have never been admitted to the United States for lawful permanent residence, which is a condition precedent to naturalization and, therefore, many of this number could not be eligible for naturalization, not because of racial disability, but because they cannot meet existing statutory requirements of the law. The number of Chinese who will be made eligible in the future, in addition to those already here, will of necessity be very small because the quota for China is limited to 105 per annum, as provided for in Section 2 of this bill."

It is concluded that Congress contemplated granting the privilege of naturalization only to those Chinese aliens who were lawfully admitted to the United States for permanent residence as immigrants. As this petitioner was admitted as a non-immigrant, he is not considered as having been lawfully admitted to the United States for permanent residence for naturalization purposes, and the certificate of arrival which forms the basis of his petition for naturalization is not a valid certificate of arrival for naturalization purposes.

B. **Petitioner Did Not File With His Petition a Certificate of Arrival Showing Admission to the United States as an Immigrant for Permanent Residence.**

Section 329 of the Nationality Act of 1924, 8 U. S. C. 729, provides that

> "No declaration of intention shall be made by any person who arrived in the United States after June 29, 1906, until such person's lawful entry for permanent residence shall have been established, and a certificate showing the day, place, and manner of arrival in the United States shall have been issued."

This provision does not apply, as the appellee by reason of marriage to an American citizen, is applying for naturalization under Section 310 of the Nationality Act of 1940, 8 U. S. C. 710, which does not require declaration of intention, but does require that the petitioner "shall have resided continuously in the United States for at least three years immediately preceding the filing of the petition." And Section 332 of that Act, 8 U. S. C. 732, requires that there be filed with a petition a certificate from the Immigration and Naturalization Service showing "the date, place, and manner of petitioner's arrival in the United States."

Referring again to the case of *Subhi Mustafa Sadi v. United States, supra,* the Court states, at page 1041, in referring to the fact that the record was admitted as a bona fide student for a period of two years:

> "It did not show that he was admitted for permanent residence, and, with the records * * * as

they now stand he cannot prove that he was," and "he could not be admitted to citizenship on his pending petition, since he could not show that he had in fact been admitted for permanent residence as the statute requires."

The above language is cited by the Court in *Jow Gin v. United States* (7 Cir. 1949), 175 F. 2d 299. And the Court goes on to say, at page 304:

> "That a Certificate of Arrival predicated upon a registry made at the time of an alien's entrance into this country showing lawful entrance for permanent residence is an indispensable requisite for admission to citizenship is plainly shown by the authorities. United States v. Ness, 245 U. S. 319, 324, 38 S. Ct. 118, 62 L. Ed. 321; Kaplan v. Tod, 267 U. S. 228, 230, 45 S. Ct. 257, 69 L. Ed. 585; Zartarian v. Billings, 204 U. S. 170, 175, 27 S. Ct. 182, 51 L. Ed. 428. * * *"

The Court further states, on page 305, that the *Pezzi* and *Sadi* cases, *supra,*

> "* * * accentuate the point that an alien is not eligible for naturalization without a Certificate of Arrival showing lawful entry for *permanent residence.*" (Emphasis added.)

V.

Conclusion.

The appellee was erroneously naturalized because he had not been lawfully admitted for permanent residence. He had not been so admitted because he was admitted under Section 3(6) of the Immigration Act of 1924, which kind of admission was as a non-immigrant for a temporary period, subject to be terminated upon abandonment or termination of status under which admitted. Such condition of temporary admission necessarily follows from the application of Sections 3(6), 15, 25 and 28 of the Immigration Act of 1924 (8 U. S. C. 203, 215, 223 and 224).

If the decision in the instant case stands, it applies to aliens coming as traders under any of nearly 30 treaties with foreign countries listed on pages 41, 42, Immigration Laws and Regulations, Ed. of March 1, 1944, that are considered treaties of Commerce and Navigation within Section 3(6) of the Immigration Act of 1924. If aliens admitted as traders under these treaties or their wives and minor children are entitled to naturalization after the required periods of residence here after admission, the result would be an endless chain of aliens obtaining admission and naturalization through Section 3(6) for the reason that as soon as they obtain naturalization they can move into lines of trade not within the terms of that provision and thus leave the international business for other aliens to come here and engage in under those treaties and that provision, one set after another, in the face of the fact

that Section 3(6) describes a class of aliens who are not immigrants and not subject to the stricter documentary requirements of the Immigration Act of 1924 as to immigration visas and quota restriction upon the issuance of such visas. A construction of the single provision of Section 3(6) that leads to such a defeat of the purposes of the restrictive provisions of the whole Immigration Act of 1924 is absurd, and the well-settled rule of law is "that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or absurd conclusion."

Lau Ow Bew v. United States, 144 U. S. 47, 59.

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